

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

**THE PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,**

**Supreme Court No. 152713**

**v**

**JUSTIN TIMOTHY COMER,  
Defendant-Appellant.**

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**Trial Court No. 2011-001804-FC  
Court of Appeals No. 318854**

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**BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS  
AMICUS CURIAE IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN**

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## STATEMENT OF QUESTIONS PRESENTED

- I. WHETHER DEFENDANT’S ORIGINAL SENTENCE FOR FIRST-DEGREE CRIMINAL SEXUAL CONDUCT WAS INVALID BECAUSE IT OMITTED A STATUTORY REQUIREMENT; AND, THEREFORE, THE TRIAL COURT WAS PERMITTED TO REMEDY THIS ERROR AFTER SENTENCING?**

The Court of Appeals answered, “Yes.”

The trial court answered, “Yes.”

Amicus answers, “Yes.”

## **STATEMENT OF FACTS**

Amicus joins the Statement of Facts of the People of the State of Michigan.

## ARGUMENT

### **I. DEFENDANT'S ORIGINAL SENTENCE FOR FIRST-DEGREE CRIMINAL SEXUAL CONDUCT WAS INVALID BECAUSE IT OMITTED A STATUTORY REQUIREMENT; THEREFORE, THE TRIAL COURT WAS PERMITTED TO REMEDY THIS ERROR AFTER SENTENCING.**

#### **Standard of Review:**

Constitutional questions, questions of statutory construction and the interpretation of court rules are all questions of law, reviewed de novo. *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004) (citation omitted) (constitutional question); *Donajkowski v Alpena Power Co*, 460 Mich 243, 248; 596 NW2d 574 (1999) (statutory interpretation); *People v Hawkins*, 468 Mich 488, 497; 668 NW2d 602 (2003) (citations omitted).

#### **Discussion:**

The Court has asked (Question 1): “whether the defendant’s original sentence for first-degree criminal sexual conduct was rendered invalid because it did not include lifetime electronic monitoring pursuant to MCL 750.520b(2)(d)[.]” and if it was invalid (Question 2), “whether the trial court was authorized to amend the defendant’s judgment of sentence on the court’s own initiative . . . in the absence of a motion filed by any party.” *People v Comer*, 4/1/16 Order, p 1. The answer to both questions should be yes. Defendant’s original sentence omitted the mandatory lifetime electronic monitoring provision – creating a defect that the trial court could not ignore once it was brought to the court’s attention – regardless of the time between the original sentencing and notification to the court, and regardless of whether a party filed a motion to correct the defect.

When presented with a question of statutory construction, the appellate court's "primary task . . . is to discern and give effect to the intent of the Legislature." *People v Gillis*, 474 Mich 105, 114; 712 NW2d 419 (2006) (citation omitted). The statutory language itself provides the "most reliable evidence of its intent . . . ." *Id.* (quoting *United States v Turkette*, 452 US 576, 593; 101 S Ct 2524; 69 L Ed 2d 246 (1981)). "If the language of a statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *Gillis*, 474 Mich at 115 (quoting *Sun Valley Foods Inc v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999)). Further, the Court engages in statutory construction in attempts to "avoid a construction that would render any part of the statute surplusage or nugatory." *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011).

MCL 750.520n(1) plainly states that: "A person convicted under section 520b or 520c for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age *shall be sentenced* to lifetime electronic monitoring as provided under MCL 791.285[.]" (emphasis added), which establishes a program in the Michigan Department of Corrections as follows: "The lifetime electronic monitoring program is established in the department. The lifetime electronic monitoring program shall implement a system of monitoring individuals released from parole, prison, or both parole and prison who are sentenced by the court to lifetime electronic monitoring. . . ." MCL 791.285(1). The trial court appropriately concluded it did not have discretion *not* to apply the mandatory monitoring statutory provision in this case because Defendant "should have been sentenced to lifetime electronic monitoring based upon the underlying conviction," resulting in a "defect [that] needs to be corrected[.]" 4/29/13 Motion Hr'g Tr, pp 4-5.



Defendant's original sentence – which omitted the monitoring provision set forth in MCL 750.520n(1) – was invalid due to this defect. This Court has provided examples of other invalid sentences: “when [the sentence] is beyond statutory limits, when it is based upon constitutionally impermissible grounds, improper assumptions of guilt, a misconception of the law, or when it conforms to local sentencing policy rather than individualized facts.” *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). And looking in part to this Court's decision, *People v Cole*, 491 Mich 324, 327; 817 NW2d 497 (2012), the Court of Appeals properly determined that with MCL 750.520n(1), “the Legislature intended to make lifetime electronic monitoring part of the sentence itself for CSC-I. Thus, because Mr. Comer's sentence did not include electronic monitoring, it was properly considered invalid by the trial court.” *People v Comer*, 312 Mich App 538; \_\_\_ NW 2d \_\_\_ (2015).

The lifetime electronic monitoring language contained in MCL 750.520n(1) is unambiguous, and, as this Court previously determined, “[t]he use of the directive ‘shall sentence’ indicates that the Legislature intended to make lifetime electronic monitoring part of the sentence itself.” *Cole*, 491 Mich at 570. It is clear that the intent of the Legislature was that an individual convicted of certain criminal sexual conduct offenses be subject to electronic monitoring after his or her period of incarceration comes to an end. Defendant's original sentence lacked this essential sentencing component, and, therefore, was invalid. A court confronted with an invalid sentence cannot allow it to stand uncorrected.

This Court recognizes that a trial court “may correct an invalid sentence after sentencing.” *Id.* (citations omitted). How long a trial court may do so after the original sentencing is irrelevant so long as the trial court does not violate the defendant's right to Due

Process. In other words, there is no bright-line rule for how long is too long and one should not be contrived – an error recognized the day after sentencing does not change in nature or significance with the passage of time, and both require correction.

Here, once the Michigan Department of Corrections notified the trial court that Defendant's sentence omitted the mandatory lifetime electronic monitoring provision, the trial court set the matter for hearing, affording Defendant due process by providing him an opportunity to withdraw his plea or to allow his plea to stand – with the understanding that the trial court was required to follow the statute and order lifetime electronic monitoring. Defendant affirmed he understood that the lifetime electronic monitoring was mandatory, and that he did not want to withdraw his plea. 4/29/13 Motion Hr'g Tr, pp 9-10. Defendant made this choice voluntarily, with the full understanding that the trial court would impose lifetime electronic monitoring – as it was compelled to do by statute – without either party filing a motion. This is a permitted practice under the court rules.

Michigan Court Rule 6.429 authorizes the trial court to modify an invalid sentence without a party motion:

A motion to correct an invalid sentence may be filed by either party. *The court may correct an invalid sentence*, but the court may not modify a valid sentence after it has been imposed except as provided by law.

MCR 6.429(A) (Authority to Modify Sentence) (emphasis added). A resentencing is “not a condition precedent for a trial court to correct an invalid sentence under MCR 6.429(A), although a defendant's right to due process must be satisfied.” *People v Harris*, 224 Mich App 597, 601; 569 NW2d 525 (1997). “Further, MCR 6.429(A) does not set time limits with respect to a trial court's authority to correct an invalid sentence.” *Harris*, 224 Mich App at 601. This is

a sound practice and policy. An error does not change or diminish over time and should be corrected when it is discovered.

Similar to matters of statutory construction, “[w]hen called on to construe a court rule, this Court applies the legal principles that govern the construction and application of statutes.” *Grievance Adm’r v Underwood*, 462 Mich 188, 193-194; 612 NW2d 116 (2000) (citation omitted). First, the Court looks to the plain language of the rule, and, if it is unambiguous, “must enforce the meaning expressed, without further judicial construction or interpretation.” *Id.* “It is well established that [the Court] interpret[s] the words of a court rule in accordance with their ‘everyday, plain meaning.’” *People v Petit*, 466 Mich 624, 627; 648 NW2d 193 (2002) (citation omitted). Further, a court should not read language into a statute or rule that is not there. “[T]his violates the well-established rule of statutory construction that a court cannot read into a statute what is not there.” *People v Perkins*, 473 Mich 626, 657; 703 NW2d 448 (2005) (citing *AFSCME v Detroit*, 468 Mich 388; 662 NW2d 695 (2003)).

There is no time limit on the trial court’s ability to correct an invalid sentence within the court rule, and one should not be read into it. Nor should the trial court be required to wait for a party to file a motion in order to correct an invalid sentence. As the trial court indicated below, a party’s inaction does not affect the court’s ability to correct a plain error:

[Trial Court]: Are you suggesting that the Court doesn’t have the ability to go back and correct what it sees as an invalid sentence? Don’t I have the right at any time? \*\*\* I don’t have to wait for the Prosecutor to tell me do I?

4/29/13 Motion Hr’g p 7. Although a party may file a motion to correct an invalid sentence under the court rule, the trial court’s authority to rectify an error is not tied to this party provision – they are separate.

In sum, once the trial court was on notice that Defendant's sentence omitted a mandatory part (lifetime electronic monitoring) it provided the parties opportunity to be heard, and, thereafter, remedied the defect. It would have been erroneous not to remedy an invalid sentence. A trial court cannot be expected to overlook a statute that the Legislature has clearly stated is to be applied to cases such as Defendant's. "A judge should be faithful to the law[.]" Michigan Code of Judicial Conduct, Canon 3(A)(1). Rectifying errors should be encouraged, so long as the trial court does so with due process, such as occurred here.

### CONCLUSION AND RELIEF REQUESTED

WHEREFORE, Amicus respectfully requests that this Honorable Court deny Defendant-Appellant's request for relief, and affirm the decision of the Court of Appeals.

Respectfully submitted,

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10/30/16  
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